IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 1916 of 1995

For Approval and Signature:

HONOURABLE MR.JUSTICE AKIL KURESHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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RAMBHAI R BRAHMBHATT & 9 - Petitioner(s)
Versus
STATE OF GUJARAT & 3 - Respondent(s)

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Appearance :
MRS KETTY A MEHTA for Petitioner(s) : 1 - 10.
RULE SERVED for Respondent(s) : 1 - 3.
MS REETA CHANDARANA, ASSISTANT GOVERNMENT PLEADER for Respondent(s) : 4,

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

Date : 24/03/2006

ORAL JUDGMENT

1. In the present petition, the petitioners, who are retired Assistant Public Prosecutors have challenged the portion of the Government Notification dated 22.06.1994 by which, cut-off date of 01.06.1994 has been provided for grant of the benefits flowing from the said

notification.

2. Facts leading to the present petition are as follows:

The petitioners were appointed on the post of Assistant Public Prosecutors after selection through Gujarat Public Service Commission (“GPSC”, for short). It is the case of the petitioners that they were holding transferable and pensionable posts. All the petitioners retired from service on different dates, details of which are supplied at Annexure-'A' to the petition.

It is the case of the petitioners that as the post of Assistant Public Prosecutor was an isolated post, there were no chances of promotion and except for being granted senior time scale after stagnation of 7 years, the petitioners had virtually no other promotional avenues or possibilities of receiving higher pay scales. The association of the Assistant Public Prosecutors, therefore, had been representing their demand for implementation of the terms and conditions of the employment of the Assistant Public Prosecutor with the State Government. In particular, their demand was for

being included in the list of officers to be given benefits under Rule 284 of the Bombay Civil Services Rules, 1959 (“BCSR”, for short). As per the said Rule, certain additional benefits of certain number of years of service is made available to specified judicial officers for the purpose of pension. I shall advert to the contents of the said Rule at a slightly later stage.

To continue narration of the events leading to the present petition, it would appear that on account of the efforts made by the association of the Assistant Public Prosecutors, the State Government accepted, in policy, their request for being granted benefits under Rule 284 of the BCSR. It is the case of the petitioners that the members of the association had a meeting with the then Law Minister in June, 1993. The Law Minister had agreed to consider the request and to place the same before the Finance Ministry. Eventually, the Government issued a notification dated 22nd June 1994. The notification is produced at Annexure-'C' to the petition. In the said notification, it is provided that the Government has decided to grant benefits flowing from Rule 284 of the BCSR also to Assistant Public Prosecutors. The order is to take effect from 1st June 1994. It is stated that

necessary amendment in the Rules shall be made in due course. Contents of the said notification dated 22nd June 1994 may be reproduced herein:

> "RESOLUTION : The benefit of addition in service for grant of pension is admissible to the categories of Judges as envisaged in BCSRs 284. The benefit is, however, not admissible to the cadre of Assistant Public Prosecutors. After careful consideration, Government is pleased to direct that the benefit of addition to service for pension admissible under rule 284 of B.C.S.R. 1959 be extended in the cadre of Assistant Public Prosecutors.
>
> 2. These orders will take effect from 1st June, 1994.
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> 3. Necessary amendment in the Bombay Civil Services Rules will be made in due course.
>
> By order and in the name of the Governor of Gujarat."

Accordingly, all Public Prosecutors who were in service as on 1st June 1994 were made eligible for the benefits flowing from Rule 284 of the BCSR whereas those Assistant Public Prosecutors who had retired before 1st

June 1994, were denied such benefits. In short, it is this cut-off date of 1st June 1994 for the purpose of granting benefits flowing from notification dated 22nd June 1994, that the petitioners have challenged in this petition.

3. It is the case of the petitioners that as Assistant Public Prosecutors, they had virtually no chance of promotion. They were only given benefits of certain higher pay scales. It is precisely for this reason that to mitigate the difficulties faced by the Assistant Public Prosecutors, that the Government accepted the stand of the association representing the Assistant Public Prosecutors and additional benefits for pension were made available pursuant to the provisions contained in Rule 284 of the BCSR. It is, therefore, the case of the petitioners that having represented their case for years together, they have been denied benefits of the fruits flowing from the Government decision on unreasonable and arbitrary grounds.

4. Appearing for the petitioners learned advocate Ms.Keety A.Mehta submitted that the cut-off date adopted by the State Government in its impugned notification

dated 22nd June 1994 is wholly arbitrary unreasonable and illegal. It was contended that the Government has not given any cogent reasons for introduction of the cut-off date and the relevance of 1st June 1994 being a proper date from which such benefits should be made available.

It was submitted that the petitioners had retired under pension scheme. They, therefore, were pension retirees. The Government thereafter cannot make sub-classification in the group of pension retirees on the basis of arbitrarily selected cut-off date. It was contended that all pension retirees from one homogeneous class and further sub-classification on the basis of cut-off date which cannot be justified by the Government, is not permissible.

It was additionally contended that by virtue of impugned notification, the State Government granted certain additional benefits in favour of retired Assistant Public Prosecutors. Thus, in a sense, there were modifications and liberalizations in the existing pension scheme. When the Government is introducing a new pension scheme, it may be open for the Government to draw cut-off line and to limit its applicability to those

retiring after such date. However, when the Government is providing for formula which amounts to liberalizing the existing pension scheme, it would not be open for the Government to limit its benefits to only those employees who were in service as on that date or on any other date interior to the date of notification and to provide that such of the pension retirees who retired before the said date, would not get benefits flowing from the Government's decision.

In support of her contention, learned advocate Mrs.Mehta placed reliance on the decision of the Hon'ble Supreme Court in the case of **D.S.NAKARA AND OTHERS VS. UNION OF INDIA**, reported in AIR 1983 S.C. 130. In the said decision, the Constitution Bench of the Hon'ble Supreme Court struck down a cut-off date introduced by the Government for applying the liberalized pension scheme.

Reliance was placed on the decision of the Hon'ble Supreme Court in the case of **V.KASTURI VS. MANAGING DIRECTOR, STATE BANK OF INDIA, BOMBAY AND ANOTHER**, reported in (1998) 8 S.C.C. 30. My attention was drawn to the observations made by the Hon'ble Supreme Court in

paragraph Nos.22 and 23 wherein it was held that if the person retiring is eligible for pension at the time of his retirement and if he survives till the time of subsequent amendment of the relevant pension scheme, he would become eligible to get enhanced pension as per the new formula of computation of pension since he belongs to the very same class of pensioners when the additional benefit is being conferred on all of them. In such a situation, the additional benefit available to the same class of pensioners cannot be denied to him on the ground that he had retired prior to the date on which the aforesaid additional benefit was conferred on all the members of the same class of pensioners.

Reliance was placed on the decision of the Hon'ble Supreme Court in the case of **SUBRATA SEN AND OTHERS VS. UNION OF INDIA AND OTHERS**, reported in (2001) 8 S.C.C. 71 wherein the Hon'ble Supreme Court was pleased to strike down the cut-off date for the applicability of revised pension scheme. Relying on the decision of the Hon'ble Supreme Court in the case of V.KASTURI VS. MANAGING DIRECTOR, STATE BANK OF INDIA, BOMBAY AND ANOTHER (supra), the Hon'ble Supreme Court found that there was no new pension scheme for payment of pension, but that

there was only a revision of the existing pension scheme which had to be made available to all the pension retirees.

Reliance was placed on the decision of the Hon'ble Supreme Court in the case of **STATE BANK OF INDIA VS. L.KANNAIAH AND OTHERS**, reported in (2003) 10 S.C.C. 499 wherein a cut-off date for the applicability of the revised minimum requirement of qualifying service for being eligible to receive pension was struck down on the ground of the same being arbitrary and in violation of Article 14 of the Constitution of India.

5. On the other hand, learned Assistant Government Pleader Ms.Reeta Chandarana opposed the petition. On the basis of affidavit in reply filed by the State Government, it was contended that to mitigate the difficulties of the Assistant Public Prosecutors, the Government has issued resolutions from time to time. In the year 1989, they were granted certain pay revisions after crossing age of 45 years. In the year 1991, 10% of the posts were granted higher scale of senior time scale. They are also getting stagnation increments as per the rules. Instead of limiting the pay scale to Rs.2000-3500,

they are granted 2200-4000 (pre-revised) and are also granted senior scale to the extent of 10% of the posts in the scale of 300-4500. It is, thus, the case of the Government that appropriate scales are being granted to the Assistant Public Prosecutors.

It is further stated that the Government considered and accepted the proposal for grant of pension to the cadre of Assistant Public Prosecutors as provided to the Judicial Officers since educational qualifications, experience etc. are similar to such officers. A decision was, therefore, taken to give such benefits from 1st June 1994.

Learned Assistant Government Pleader, therefore, submitted that there is no justification in challenge made by the petitioners to the cut-off date introduced by the State Government. She submitted that when a new policy is being formulated, it is always open for the State Government to provide for a date from which such policy shall be implemented. Choice of the date cannot be said to be arbitrary, unless so pointed out by the petitioners. It was contended that the benefits of the policy are being made available to all the existing

Assistant Public Prosecutors, but those retired from service long back, cannot be granted such benefits. Relying on the decision of the Division Bench of this Court in the case of STATE OF **GUJARAT AND OTHERS VS. NARSINHDAS KRISHNADAS AGRAVAT** decided on 22nd June 2005 in Letters Patent Appeal No.610 of 2005 and connected matters, she submitted that the cut-off date is just and proper. She placed reliance on the observations made by the Division Bench in the said decision wherein relying upon number of decisions of the Hon'ble Supreme Court on the issue, the Division Bench set aside the decision of the learned single Judge whereby the cut-off date for applicability of the pension scheme formulated by the Government for primary schools was set aside by the learned single Judge.

6. Having heard the learned advocates appearing for the parties to decide the legal controversy, it will be necessary to take note of the provisions contained in Rule 284 of the BCSR. Rule 284 of the said Rules reads as follows:

> (a)The scales of pensions prescribed by Rule 282 are applicable to the superannuation pensions of all Government servants subject to these rules.

(b)An addition may be made for the purpose of calculating superannuation pension to the duty performed in the following cases:-

(i)A Government servant who entered Government service on or before the 3rd August, 1931 and has no break in his service since that date and whose whole pensionable service has been rendered in one or other of the posts and services included in Appendix XI may add to the duty counting for pension, if that duty is not less than 9 years. 4/5ths of the period by which has age on first appointment to such post or service exceeded 25 years, provided the addition so made shall not exceed four years.

Note.- See clause (j) in Rule 245.

Exception.- The concession above is admissible to a Government servant whose whole pensionable service has been rendered in a post of service mentioned below even though he may have entered service after the 3rd August, 1931:-

1. Assistant Judges.
2. Magistrates for the city of Ahmedabad (including the Chief Magistrate).
3. Judges of Small Causes Court, Ahmedabad (including the Chief Judge).
4. District and Sessions Judges.
5. Civil Judges, Senior and Junior Division, and the Resident Magistrates directly recruited

from the Bar.

6. President and Members of the Industrial Court.
7. Adjudicators and Members of Industrial Tribunals.
8. Judges of the Labour Courts (senior and Jr.Division)

Note.- Items 6 and 7 above will take effect from 31st March, 1960.

(ii) A person who has been appointed, direct to the post of Administrator General and Official Trustee or of Chief Judge, Small Causes Court, Bombay or of Chief Presidency Magistrate, Bombay, may, if the duty counting for pension is not less than nine years, add to it four-fifths of the period by which age age on appointment exceeded twenty-five years, subject to a maximum addition of eight years.

(iii) The concession admissible under the above rule should be extended to the Judges of the Ahmedabad City Civil Court, including the Principal Judge, who are appointed directly from the Bar.

Such of the Judges referred to above as are governed by the Revised Pension Rules should, if the qualifying service counting for pension is not less than ten years, be allowed to add to their service the number of years by which their age on appointment exceeded twenty-five years, subject to a maximum addition of ten years.

Note 1.- In case of Civil Judge of Junior Division the term “age on appointment” shall be taken to mean his age at the time of continuous appointment, and such period of non-continuous duty counting for pension under Note 2 to Rule 249 as may be recovered by it be deducted from the period to be added under this rule.

Note 2.- In concessions mentioned in sub-clauses (i) and (ii) of clause (b) of this rule are alternative i.e. a Government servant to whom the provisions of both the sub-clauses apply may be allowed the benefit of the concession admissible under one of the two sub-clauses but not under both.

Note 3.- In the case of holders of the posts of Presidency Magistrate (including Chief Presidency Magistrate) Judge of the Court of Small Causes, Bombay (including Chief Judge) and Administrator General and Official Trustee, subsequent promotion to a post, other than the posts mentioned above, which is of a similar nature and carries not less pay, does not deprive the officer concerned of the concession given by sub-clause (i) or by sub-clause (ii), as the case may be, of this rule, if he has performed not less than 4 1/2 years of duty in one or more of the posts referred to above.”

7. From the reading of the said Rule, it would emerge that as per Clause (b)certain additional weightage of service is to be granted for the purpose of calculating

superannuation pension in favour of Government servant who entered Government service on or before 3rd August 1931 and has no break in service since that date and whose whole pensionable service has been rendered in one or the other of the posts and service included in Appendix XI. Exception to clause (b) of Rule 284 provides for said concession being admissible to Government servant whose whole pensionable service has been rendered in a post of service mentioned therein, even though he may have entered service after 3rd August 1931. Post in service mentioned for such exception include Assistant Judges, Magistrates for the city of Ahmedabad, Judges of Small Causes Courts, District and Sessions Judges etc. It is further provided that for such Judges, if their qualifying service for counting pension is not less than 10 years shall be allowed to add to their service the number of years by which their age on appointment exceeded 25 years, subject to a maximum addition of 10 years.

In essence, under 284 of the BCSR, Judicial Officers mentioned under the exception to clause (b) are given certain additional number of years of weightage for calculation of pension on certain conditions. Essentially

if the pensionable service of the retiring Judicial Officer is not less than 10 years, he is to be allowed for the purpose of pension to add to his service the number of years by which his age on the date of appointment exceeds 25 years, subject to a maximum of 10 years.

Let us take a concrete example. If an Assistant Judge entered the service at the age of 28 years, upon his retirement on crossing the age of 58 years, would under normal circumstances get pension on the basis of his 30 years service. On account of provisions of Rule 284 of BSCR, he would get additional weightage of 3 years of service since his age at the time of entering in service excluded 25 years by 3 years.

It can thus be seen that Rule 284 of BCSR gives certain notional benefits for computation of pensionable service under certain circumstances. By including Assistant Public Prosecutors for being granted such benefits, the Government made them eligible for receiving additional number of years of service as weightage for computing pension upon retirement. In essence, therefore, the notification amounted to improving the pensionary

benefits being made available to retired Assistant Public Prosecutors. In that sense, the notification in question is to be treated as one which essentially and effectively liberalized the existing pension scheme. It is not in dispute that the pension scheme was always in existence and applicable to all the petitioners. All the petitioners retired as pension retirees. They were not CPF retirees nor by virtue of notification dated 22nd June 1994, a new pension scheme being introduced by the State Government covering all Assistant Public Prosecutors. All Assistant Public Prosecutors including the petitioners irrespective of the date of retirement had retired from Government under pensionable service. When the Government was, therefore, formulating a further policy of liberalizing the pensionary benefits being made available to Assistant Public Prosecutors, it was in my opinion, not open for the State Government to exclude the petitioners from the benefits flowing from such policy. By notification dated 22nd June 1994, the Government granted additional benefits of certain number of years of service depending on facts and circumstances arising in each case as flowing from Rule 284 of BCSR. On the basis of such provisions made by the Government, Assistant Public Prosecutors retiring after 1st June 1994 are made

eligible to receive enhanced pension. Such enhancement was as a result of notional benefits of service being made available to them as per provisions contained in Rule 284 of BCSR in addition to actual pensionable service put in. Such additional benefits can be termed only as liberalizing the existing pension scheme and no new scheme is being introduced by the State Government. The present case would, therefore, fall under the line of decision leading from the D.S.NAKARA's case (supra) and followed by the Hon'ble Supreme Court in several subsequent decisions which have been noted hereinabove. Particularly in case of V.KASTURI (supra), the Hon'ble Supreme Court made following observations in paragraph Nos.22 and 23:

> “22. If the person retiring is eligible for pension at the time of his retirement and if he survives till the time of subsequent amendment of the relevant pension scheme, he would become eligible to get enhanced pension or would become eligible to get more pension as per the new formula of computation of pension subsequently brought into force, he would be entitled to get the benefit of the amended pension provision from the date of such order as he would be a member of the very same class of pensioners when the additional benefit is being conferred on all of them. In such a situation, the

additional benefit available to the same class of pensioners cannot be denied to him on the ground that he had retired prior to the date on which the aforesaid additional benefit was conferred on all the members of the same class of pensioners who had survived by the time the scheme granting additional benefit to these pensioners came into force. The line of decisions tracing their roots to the ratio of Nakara Case would cover this category of cases.

23. However, if an employee at the time of his retirement is not eligible for earning and stands outside the class of pensioners, if subsequently by amendment of the relevant pension rules any beneficial umbrella of pension scheme is extended to cover a new class of pensioners and when such a subsequent scheme comes into force, the erstwhile non-pensioner might have survived, then only if such extension of pension scheme to erstwhile non-pensioners is expressly made retrospective by the authorities promulgating such scheme; the erstwhile non-pensioner who has retired prior to the advent of such extended pension scheme can claim benefit of such a new extended pension scheme. If such new scheme is prospective only, old retirees non-pensioners cannot get the benefit of such a scheme even if they survive such new scheme. They will remain outside its sweep. The decisions of this Court covering such second category of cases are: *Commander, Head Quarter v. Capt. Biplabendra Chanda and Govt. of T.N. v. K. Jayaraman* and others to which we have made a reference earlier. If the

> claimant for pension benefits satisfactorily brings his case within the first category of cases, he would be entitled to get the additional benefits of pension computation even if he might have retired prior to the enforcement of such additional beneficial provisions. But if on the other hand, the case of a retired employee falls in the second category, the fact that he retired prior to the relevant date of the coming into operation of the new scheme would disentitle him from getting such a new benefit."

8. Even in the Division Bench's decision of this Court in the case of STATE OF GUJARAT AND OTHERS VS. NARSINHDAS KRISHNADAS AGRAVAT (supra), the Division Bench had taken note of two different categories of cases. One wherein existing pension scheme is being liberalized by the State Government and another wherein a new pension scheme or new benefits are being made available for the first time. Observations made by the Division Bench in this regard need to be noted:

> "The principles which can be deduced from the above noted judicial precedent are that if an existing Pension Scheme is revised or liberalized, then the benefit of revision/liberalization has to be given to the existing pensioners and they cannot be divided into two or more groups with reference to a

particular date except when there are cogent and rational reasons for making classification or dividing the pensioners into two groups. However, if the employer introduces a new scheme for the first time, it is well within its domain to specify any particular date for implementation of scheme and those who may have retired prior to that date cannot complain of discrimination or invoke doctrine of equality enshrined under Articles 14 and 16 of for issuance of a direction to the employer to extend the benefit of Pension Scheme to the pre cut-off date retirees. Similarly, if an existing Provident Fund Scheme is replaced by Pension Scheme, the employer has the discretion to fix the cut off date for enforcing the Pension Scheme and the Provident Fund holders who may have retired prior to that date cannot contend that the Pension Scheme is violative of their fundamental right to equality. The burden to prove that the date fixed for implementation of the new Pension Scheme is arbitrary is always on the petitioner and unless a very strong case is made out, the Court will not interfere with the employer's choice of the date. Ordinarily, the Court will presume that the date fixed for implementation of the Pension Scheme is rational and does not suffer from the vice of discrimination. However, such presumption is rebuttable and the Court may nullify the discretion exercised by the employer if it is proved by the petitioner that the choice of the date is wholly arbitrary or irrational or is wide of the mark.”

10. In the present case, the State Government has not pressed in service financial constraints for limiting the benefits. Whether such constraints would justify the cut-off date in a circumstances like these, need not to gone into. It has not been urged by the Government that the additional burden required to be weighed by the Government on account of making such benefits available without reference to a cut-off date would be enormous. In any case, the petitioners have stated in the petition that currently there are only about 32 Assistant Public Prosecutors who have retired prior to 1st June 1996. Considering all these aspects of the matter, I find that the petitioners have made out a case for striking down the cut-off date of 1st June 1994 introduced in the notification dated 22nd June 1994. In the result, by allowing the petition, the said cut-off date of 1st June 1994 contained in notification date 22nd June 1994 for the applicability of such notification is struck down. All the petitioners are held eligible to receive the benefits flowing from the said notification. In the result, the petition is allowed. Rule is made absolute with no order as to costs.

Before parting, I find it appropriate to observe

that the Government has not issued appropriate amendments in the BCSR. To avoid any future complications, if Government would be well advised to carry out such amendments since the policy of the Government is to give benefits to the Assistant Public Prosecutors as flowing from Rule 284 of the BCSR.

(AKIL KURESHI, J.)

*Shitole